

10-4527-cr
United States v. Steppello

1
2 UNITED STATES COURT OF APPEALS
3
4 FOR THE SECOND CIRCUIT
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8 August Term, 2011
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10 (Argued: December 7, 2011 Decided: December, 23, 2011)
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12 Docket No. 10-4527-cr
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14
15 UNITED STATES OF AMERICA,
16

17 *Appellant,*
18

19 -v.-
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21 DEAN A. STEPPELLO,
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23 *Defendant-Appellee.*
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27 Before:
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29 JACOBS, *Chief Judge*, CABRANES, and WESLEY, *Circuit Judges*.
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31 Appeal from two interlocutory orders of the United
32 States District Court for the Northern District of New York
33 (Hurd, J.). The first order suppressed cocaine seized from
34 Defendant's person incident to his warrantless arrest, as
35 well as statements made by Defendant, based on a lack of
36 probable cause to support the arrest. The order also
37 suppressed evidence seized from Defendant's residence
38 pursuant to the execution of a search warrant on the ground
39 that without the reference to the cocaine seized from
40 Defendant's person, the warrant application did not
41 establish probable cause to search the residence. The
42 second order denied the government's motion for
43 reconsideration of the suppression decisions in the first
44 order. We hold that the district court erred in determining
45 that Defendant's warrantless arrest was not supported by
probable cause, and thus evidence seized from Defendant's

1 person and residence, as well as the statements made by
2 Defendant during and after his arrest, should not have been
3 suppressed.

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5 **REVERSED** and **REMANDED**.
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10 PAUL D. SILVER, Assistant United States Attorney
11 (Richard Southwick, Tamara Thomson, Assistant
12 United States Attorneys, *on the brief*), for
13 Richard S. Hartunian, United States Attorney
14 for the Northern District of New York, Albany,
15 NY, *for Appellant*.

16 LEE D. GREENSTEIN, Law Offices of Lee D. Greenstein,
17 Delmar, NY, *for Defendant-Appellee*.
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21 PER CURIAM:

22 The government appeals two interlocutory orders of the
23 United States District Court for the Northern District of
24 New York (Hurd, J.), entered on August 20, 2010 and October
25 29, 2010, respectively. The first order suppressed cocaine
26 seized from the person of Defendant-Appellee Dean A.
27 Steppello incident to his warrantless arrest, as well as
28 statements made by Steppello, based on a lack of probable
29 cause to support the arrest. The order also suppressed
30 evidence seized from Steppello's residence pursuant to the
31 execution of a search warrant on the ground that without the
32 reference to the cocaine seized from Steppello's person, the

1 warrant application did not establish probable cause to
2 search the residence. The second order denied the
3 government's motion for reconsideration of the suppression
4 decisions in the first order. The government argues that
5 the district court erred in determining that Steppello's
6 arrest was not supported by probable cause. We agree and
7 conclude that the evidence seized from Steppello's person
8 and residence, as well as the statements made by Steppello
9 during and after his arrest, should not have been
10 suppressed.

11 I. Background

12 A. Steppello's Arrest

13 On June 25, 2008, James Eric Jones, an investigator
14 with the New York State Police Community Narcotics
15 Enforcement Team ("CNET"), executed a search warrant at the
16 residence of Richard Szuba. During the search, Szuba agreed
17 to cooperate with police and identified Steppello as his
18 cocaine supplier. Investigator Jones was aware that
19 Steppello had been the subject of an earlier drug
20 investigation and that he had sold cocaine in the presence
21 of a New York state trooper in November 2001. Szuba
22 indicated that his transactions with Steppello had been

1 ongoing for approximately four years and that Steppello
2 would supply him with four ounces of cocaine in exchange for
3 approximately \$3600 every two weeks. Szuba then described
4 the coded nature of their cocaine transactions—Szuba would
5 call Steppello on his cell phone and ask "Are you good?" and
6 Steppello would deliver the cocaine to Szuba's residence
7 shortly thereafter. Szuba showed the police Steppello's
8 residence on the second floor of a two-story house, and
9 described Steppello's vehicle as an Envoy or sport utility
10 vehicle ("SUV").¹

11 While officers were questioning Szuba at his house,
12 others, including Investigator Sullivan, were surveilling
13 Steppello's residence. The officers had Szuba call
14 Steppello to determine whether he would be nearby because
15 during their surveillance of Steppello's home, they observed
16 a person leaving the building.² At approximately 1:14 p.m.,

¹ There is a discrepancy in the suppression hearing testimony about the color of the vehicle. Szuba testified that he told police that Steppello drove a "silver colored SUV type truck." Investigator Matthew Sullivan testified that Szuba told police that Steppello operated a "gray or silver colored GMC." However, Investigator Jones testified that Szuba described Steppello's vehicle as a "light gold colored Envoy or SUV."

² The record does not indicate that the officers knew the identity of the person leaving. Indeed, the record does not establish that Szuba provided Steppello's physical description to the police. Nor does the record establish that Investigator

1 Investigator Jones closely observed Szuba call Steppello,
2 whose telephone number was preprogrammed as a speed dial
3 number in Szuba's cell phone. During the conversation,
4 Investigator Jones heard Szuba say "you good, this
5 afternoon, 20 minutes." Although Investigator Jones knew
6 that someone was speaking to Szuba, he could not hear what
7 that person said. At the completion of the call, Szuba told
8 Investigator Jones that Steppello would arrive at Szuba's
9 house in twenty minutes with cocaine.

10 At 1:34 p.m., Investigator Sullivan observed a white
11 male arrive at Steppello's residence in a silver GMC SUV and
12 enter the residence. Five minutes later, Investigator
13 Sullivan observed the white male get back into the vehicle
14 and drive away. Investigator Sullivan followed the vehicle
15 to the vicinity of Szuba's residence, where he terminated
16 the surveillance to avoid detection. Investigator Sullivan
17 immediately notified the officers at Szuba's residence that
18 the person under surveillance was coming.

19 Although Szuba advised officers that he usually left

Jones knew Steppello's physical description from his knowledge of the earlier investigation.

1 the garage door open when Steppello delivered cocaine,³ the
2 police closed the door and hid in the garage. The white
3 male arrived at Szuba's house and parked his GMC Envoy in
4 the driveway. An officer inside the house relayed to
5 Investigator Jones, who was in the garage, that Steppello
6 called Szuba's cell phone ten times and Szuba's house once.⁴
7 When the officers heard a person exit the vehicle, they
8 proceeded to exit the garage and arrested the white male in
9 the driveway. As the officers took the person to the ground
10 to handcuff him, he uttered that "he could do somebody."

11 The officers immediately searched the person and found
12 a small plastic bag containing cocaine in his pants pocket.
13 The person arrested was Steppello. Moments later, after
14 Investigator Jones issued *Miranda* warnings, Steppello stated

³ The district court did not make this specific factual finding. The record indicates that the finding is supported by the testimonies of not only two officers, but also Szuba himself. On appeal, Steppello merely argues that Szuba testified that the garage door was not *always* open when Steppello arrived, and a third officer did not recall any discussion about the garage door. However, Steppello does not contest that Szuba testified that he *generally* left the garage door open for Steppello.

⁴ Investigator Jones did not actually see the white male make the phone calls because he could not continue looking through a garage window for fear of being discovered. Szuba testified that he did not receive any phone calls from Steppello while the police were at his house. However, Szuba also explained that officers took his phone from him during that time. Cellular telephone records established that Steppello made eleven unanswered calls to Szuba between 1:43 p.m. and 1:47 p.m.

1 that he wanted to speak to his attorney and the District
2 Attorney before identifying his supplier.

3 **B. Search Warrant for Steppello's Residence**

4 After securing the cocaine from Steppello's person,
5 Investigator Jones proceeded to the Utica City Court, where
6 he reviewed and signed both the application for a warrant to
7 search Steppello's residence and vehicle and the affidavit
8 in support of the search warrant application. The affidavit
9 established that Investigator Jones—a New York State police
10 officer for twelve years and member of the CNET for
11 approximately three years—had been thoroughly trained to
12 combat drug trafficking. The affidavit also established
13 that as a result of his training and experience with drug-
14 related investigations and arrests and with handling
15 confidential informants, Investigator Jones was familiar
16 with the communication methods and customs used by persons
17 involved in drug trafficking.

18 The affidavit then set forth the events that occurred
19 that day, which included the controlled phone call Szuba
20 made to Steppello, the surveillance of Steppello's
21 residence, and the arrest of Steppello and incident seizure
22 of cocaine from his person. The affidavit also noted

1 Steppello's criminal history and that he was the registered
2 owner of the GMC Envoy he drove to Szuba's house. Finally,
3 the affidavit concluded, based upon the information provided
4 by Szuba, the surveillance conducted by New York State
5 Police, and the resulting arrest of Steppello and incident
6 seizure of cocaine from his person, that Steppello was
7 utilizing his residence and vehicle to further a cocaine
8 distribution operation.

9 The Utica City Court issued the search warrant. During
10 the subsequent search of Steppello's residence, police
11 seized two jars containing cocaine, drug-related
12 paraphernalia, and \$4000 in cash.

13 **C. Indictment and Suppression Decision**

14 On May 28, 2009, a grand jury returned a two-count
15 indictment charging Steppello with possessing with intent to
16 distribute an unspecified quantity of cocaine, in violation
17 of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and possessing with
18 intent to distribute more than 500 grams of cocaine, in
19 violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). In a
20 pretrial motion, Steppello sought to suppress the cocaine
21 seized from his person incident to his arrest, as well as
22 the cocaine seized from his residence pursuant to the

1 execution of the search warrant. In a subsequent motion,
2 Steppello sought to suppress statements he made following
3 his arrest on the basis that they were the fruit of his
4 unlawful arrest. On June 7, 2010, the district court
5 conducted an evidentiary hearing on the issues raised by
6 Steppello's motions.

7 In a Memorandum-Decision & Order, entered on August 20,
8 2010, the district court determined that the admissibility
9 of the cocaine seized from Steppello's person and the
10 statements he made following his arrest depended on whether
11 police had probable cause to arrest him. The court
12 concluded that probable cause was lacking because at the
13 time Steppello was arrested, "the police had nothing more
14 than the partially corroborated account of a criminal
15 informant with no history of reliability." *United States v.*
16 *Steppello*, 733 F. Supp. 2d 347, 351 (N.D.N.Y. 2010). The
17 court also noted that Steppello had not engaged in any
18 suspicious activity while under surveillance. The court
19 next determined that the admissibility of evidence seized
20 from Steppello's residence depended on the legality of his
21 arrest because without the reference to the cocaine seized
22 from his person, the warrant application did not establish

1 probable cause to search the residence. Accordingly, the
2 district court granted Steppello's motion to suppress (1)
3 the cocaine seized incident to his arrest; (2) the
4 statements he made during and after his arrest; and (3) the
5 evidence seized from his residence.

6 **D. Motion for Reconsideration**

7 The government moved for reconsideration of the
8 district court's suppression decision. The government
9 argued that, in light of this Court's decision in *United*
10 *States v. Gagnon*, 373 F.3d 230 (2d Cir. 2004), the district
11 court improperly discounted the information provided by
12 Szuba. The government also noted that the district court
13 erred when it determined in its suppression decision that no
14 cellular phone records were in evidence to corroborate the
15 government's account that Steppello made eleven calls to
16 Szuba while sitting in his car in Szuba's driveway. The
17 district court denied the motion for reconsideration without
18 explanation. With the authorization of the Solicitor
19 General of the United States, this appeal ensued.

1 **II. Discussion**

2 **A. Legality of Steppello's Arrest**⁵

3 The government contends that the district court erred
4 in determining that police lacked probable cause to arrest
5 Steppello because the court failed to consider the totality
6 of the circumstances known to police and failed to
7 appreciate the reliability of Szuba's information. We
8 agree. Neither the district court's determination nor
9 Steppello's arguments on appeal square with our well-
10 established principles of probable cause.

11 "Probable cause exists if a law enforcement official,
12 on the basis of the totality of the circumstances, has
13 sufficient knowledge or reasonably trustworthy information
14 to justify a person of reasonable caution in believing that
15 an offense has been or is being committed by the person to
16 be arrested." *Gagnon*, 373 F.3d at 236. "[T]he probable-
17 cause standard is a practical, nontechnical conception that

⁵ "On appeal from a district court's grant of a motion to suppress, we review factual findings for clear error, viewing those facts in the light most favorable to the government, and we analyze *de novo* the ultimate determination of such legal issues as probable cause." *United States v. Howard*, 489 F.3d 484, 490-91 (2d Cir. 2007) (citation and internal quotation marks omitted). We likewise analyze *de novo* "whether the exception for a search incident to . . . arrest is applicable." *United States v. Valentine*, 539 F.3d 88, 93 (2d Cir. 2008) (citation omitted).

1 deals with the factual and practical considerations of
2 everyday life on which reasonable and prudent men, not legal
3 technicians, act. Because the standard is fluid and
4 contextual, a court must examine the totality of the
5 circumstances of a given arrest." *United States v.*
6 *Delossantos*, 536 F.3d 155, 159 (2d Cir. 2008) (citations and
7 internal quotation marks omitted).

8 Contrary to the district court's conclusion, the facts
9 surrounding Steppello's arrest, see *supra* Part I.A., were
10 sufficient to provide police with probable cause to make the
11 arrest. The district court made two significant errors in
12 discounting the evidence. First, the district court failed
13 to examine the totality of the circumstances, and instead,
14 considered individual facts in isolation. See *Maryland v.*
15 *Pringle*, 540 U.S. 366, 371 (2003); *Delossantos*, 536 F.3d at
16 161. Second, the district court failed to "evaluate the
17 facts in light of the training and experience of the
18 arresting agents." *Delossantos*, 536 F.3d at 161.

19 [S]ome patterns of behavior which may seem innocuous
20 enough to the untrained eye may not appear so
21 innocent to the trained police officer who has
22 witnessed similar scenarios numerous times before.
23 As long as the elements of the pattern are specific
24 and articulable, the powers of observation of an
25 officer with superior training and experience should
26 not be disregarded.

1 *Id.* (alteration in original) (internal quotation marks
2 omitted).

3 For example, the district court erred in discounting
4 the significance of the phone call between Szuba and
5 Steppello "due to its brevity, the inability to hear what
6 defendant said, and the lack of any reference to a drug
7 sale." *Steppello*, 733 F. Supp. 2d at 351. At the time of
8 the arrest, Investigator Jones had been employed by the New
9 York State Police for twelve years and a member of the CNET
10 for three years. An officer with his training and
11 experience certainly would have recognized that the cryptic
12 nature of the call was consistent with other transactions in
13 which drug dealers "often engage in a so-called narcotics
14 code." *United States v. Velasquez*, 271 F.3d 364, 372 (2d
15 Cir. 2001) (internal quotation marks omitted). Indeed,
16 immediately after the phone call, Szuba confirmed to
17 Investigator Jones that Steppello would be at Szuba's
18 residence in twenty minutes with cocaine.⁶

19 Next, the district court erred in discounting the

⁶ The use of code language makes sense and is chronicled regularly in our cases. See *Velasquez*, 271 F.3d at 372; *United States v. Bryce*, 208 F.3d 346, 349 (2d Cir. 1999); *United States v. Cancelmo*, 64 F.3d 804, 808 (2d Cir. 1995). One would not expect two individuals involved in the sale of illegal substances to speak in traditional terms of commerce.

1 significance of the eleven phone calls made by Steppello to
2 Szuba immediately prior to Steppello's arrest. Contrary to
3 the district court's assertion that there was a "lack of any
4 evidence of defendant's or Szuba's cellular phone records
5 for the day of the arrest," *Steppello*, 733 F. Supp. 2d at
6 352, Steppello's phone records were received in evidence
7 during the suppression hearing. Although Szuba testified
8 that he never received any of the calls, he also testified
9 that the police took his phone away from him for "a while"
10 that day. Moreover, in light of Investigator Jones's
11 training and experience, it would have been reasonable for
12 him to believe that Steppello acted suspiciously by making
13 the phone calls instead of getting out of the car,
14 especially given Szuba's prediction that closing the garage
15 door might alert Steppello.

16 Finally, although police did not identify the white
17 male under surveillance, the circumstances suggested that it
18 was Steppello: (1) at 1:14 p.m., Szuba called Steppello and
19 said the same coded words he claimed to have used before to
20 purchase cocaine from Steppello; (2) immediately after that
21 phone call, Szuba told Investigator Jones that Steppello
22 would be arriving in twenty minutes with cocaine; (3) at

1 1:34 p.m., a person driving the type of SUV Szuba described
2 as Steppello's vehicle arrived at and entered Steppello's
3 residence; (4) five minutes later, the person drove the SUV
4 to Szuba's residence; (5) upon arriving at Szuba's house,
5 the person did not immediately exit the car; and
6 (6) Steppello made eleven phone calls to Szuba between 1:43
7 p.m. and 1:47 p.m. Any reasonable officer with knowledge of
8 those circumstances at the time of the arrest would be
9 entitled to conclude that the person under surveillance was
10 Steppello, and that he was about to deliver cocaine to
11 Szuba.

12 With regard to the reliability of the information
13 provided by Szuba, the district court erred in discounting
14 that information on the ground that Szuba did not have a
15 history of reliability as a confidential informant. In
16 *United States v. Gagnon*, we found that probable cause
17 existed to search the defendant's vehicle and thus reversed
18 this same district judge's order suppressing currency seized
19 during the search. 373 F.3d at 240. In doing so, we
20 clearly articulated the legal principles used to evaluate
21 information provided by informants:

22 Often the information needed to supply probable
23 cause is not gathered independently by police

1 officers but instead is provided by professional
2 criminal informants, witnesses to a particular
3 event, or participants in the crime at issue. In
4 assessing the veracity of an informant's statements,
5 it is improper to discount the information provided
6 simply because [the informant] has no proven record
7 of truthfulness or accuracy. There is, in
8 particular, no need to show past reliability when
9 the informant is in fact a participant in the very
10 crime at issue. However, although other circuits
11 have recognized that criminals caught red-handed may
12 be reliable sources of information because [t]he
13 informant's interest in obtaining leniency creat[es]
14 a strong motive to supply accurate information, we
15 have also cautioned that a criminal informer is less
16 reliable than an innocent bystander with no apparent
17 motive to falsify. Whether or not the informant
18 speaks to an officer in person or through the
19 mediation of an anonymous means of communication may
20 also bear upon the reliability of the information he
21 provides; thus, a face-to-face informant must be
22 thought more reliable than an anonymous telephone
23 tipster, for the former runs the greater risk that
24 he may be held accountable if his information proves
25 false.

26
27 In addition to considering an informant's
28 veracity, reliability, and basis of knowledge, in
29 assessing the totality of the circumstances we also
30 evaluate whether the information an informant
31 provides is corroborated by independent police
32 investigation because an informant who is right
33 about some facts is more likely to be right about
34 others. We consider such corroboration in
35 evaluating the existence of probable cause even if
36 only an informant's account of anticipated innocent
37 activities is confirmed.

38
39 *Gagnon*, 373 F.3d at 236 (alternations in original)

40 (citations, internal quotation marks, and ellipses omitted).

1 Here, as in *Gagnon*, the district court employed an
2 incorrect legal standard in evaluating the information
3 provided by the informant. Szuba was a participant in the
4 crime at issue; he gave the information to the officers in
5 person after they executed a valid search warrant at his
6 residence; and at that time, Szuba was motivated to be
7 truthful to receive leniency. Those circumstances suggest
8 reliability. See *id.* at 237-38.

9 Moreover, the information Szuba provided was specific
10 and corroborated. For example, Szuba predicted just what
11 Steppello would do in response to his cryptic phone call.
12 Szuba also accurately described Steppello's residence and
13 the type of vehicle he drove. Finally, the district court
14 was clearly and inexplicably wrong in concluding that "there
15 was no independent corroboration of [Szuba's] allegation of
16 [Steppello's] drug dealing." *Steppello*, 733 F. Supp. 2d at
17 351. Investigator Jones was aware that Steppello had sold
18 cocaine in the presence of an undercover officer while he
19 was the subject of a prior narcotics investigation. Szuba's
20 corroborated information supports the finding that police
21 had probable cause to arrest Steppello.

1 In sum, given the totality of the circumstances, the
2 officers had probable cause as a matter of law to believe
3 that Steppello was delivering cocaine at the time of his
4 arrest. Accordingly, the cocaine seized incident to
5 Steppello's arrest and the statements he made during the
6 course of his arrest should not have been suppressed.

7 **B. Suppression of the Evidence Seized From Steppello's**
8 **Residence**⁷
9

10 As an initial matter, we agree with both the district
11 court and the government that without reference to the
12 cocaine seized from Steppello's person, probable cause was
13 lacking to issue the warrant to search his residence.
14 Accordingly, whether the district court erred in suppressing
15 the evidence seized from Steppello's residence turns on the
16 legality of Steppello's arrest.⁸

17 As explained above, the district court erred in
18 determining that police did not have probable cause to
19 arrest Steppello at Szuba's house. The fact that the

⁷ We review *de novo* whether there was probable cause to issue a search warrant. *United States v. Irving*, 452 F.3d 110, 125 (2d Cir. 2006).

⁸ The district court also declined to apply the good faith exception to the exclusionary rule. *Steppello*, 733 F. Supp. 2d at 354 (citing *United States v. Leon*, 468 U.S. 897, 922-23 (1984)). The government, however, has declined to address the good faith ruling on appeal.

1 officers seized cocaine from Steppello's person incident to
2 his lawful arrest, along with the other facts disclosed in
3 the application and affidavit in support of the search
4 warrant, certainly established probable cause to believe
5 that cocaine was located in Steppello's residence. See
6 *United States v. Elmore*, 482 F.3d 172, 184 (2d Cir. 2007).
7 Accordingly, the search was lawful, and the evidence seized
8 from Steppello's residence should not have been suppressed.
9

10 **C. Remand Instructions**

11 We note that we are reversing the suppression order of
12 this district judge on substantially the same grounds as we
13 reversed the same judge's suppression order in *Gagnon*. We
14 are mindful that there are factual differences between
15 *Gagnon* and this case, but we cannot overlook that the legal
16 principles set forth in *Gagnon* strongly compel that Szuba's
17 information should not have been discounted and that
18 probable cause existed to arrest Steppello. The district
19 court made no credibility determinations that undercut the
20 factual record we have recited above.

21 The government brought our decision in *Gagnon* to the
22 district judge's attention in its motion for

1 reconsideration, but the district judge denied the motion
2 without comment. When circumstances "might reasonably cause
3 an objective observer to question [the judge's]
4 impartiality," we have the power to remand the case to a
5 different judge. *Pescatore v. Pan Am. World Airways, Inc.*,
6 97 F.3d 1, 21 (2d Cir. 1996) (alteration in original)
7 (internal quotation marks omitted); see also *United States*
8 *v. Robin*, 553 F.2d 8, 9-10 (2d Cir. 1977) (*en banc*). We
9 believe that is warranted here. Accordingly, we order that,
10 upon remand to the district court, this case be transferred
11 to a different judge.

12 **III. Conclusion**

13 For the foregoing reasons, the suppression order of the
14 district court is **REVERSED** and the case is **REMANDED** with
15 instructions to assign the case to a different judge.